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No. 90-1083

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

VILLAGE OF WILMETTE and FRED W. STOECKER,

Petitioners,

-vs-

NATIONAL PEOPLES ACTION,

Respondent.

On Petition for Writ of Certiorari
From The United States Court of Appeals
For the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents request that the Petition for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered on October 3, 1990 and reported at 914 F.2d 1008, be denied.

PETITIONERS FAIL TO STATE FACTS MATERIAL TO THE QUESTIONS PRESENTED

Petitioner's door-to-door solicitors chose not to solicit rather than submit to fingerprinting which they associated with having committed a crime. The fingerprinting, as conducted by Petitioners' at the village police station, could not be used, and were not used, for conducting criminal background investigations and these investigations could be conducted, and were conducted, by other means.

The only possible use of the fingerprints would be subsequent criminal investigations, but even this possible use was remote because of the unprofessional procedure in which the fingerprints are taken (on the back of the solicitor application form and not on special classification cards). Furthermore, the fingerprinting of solicitors had <u>never</u> been used for subsequent criminal investigations.

Not only had Respondent's solicitors refused to submit fingerprinting, but, according to the testimony of Petitioner Stoecker (the chief of police), other prospective solicitors had forgone applying for solicitation permits when they saw the fingerprinting process.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

Petitioners assert in the body of the Petition (although not framed as "Questions Presented") that: 1) the Court of Appeals "ignored" some of the standards for issuance of preliminary injunction and "misconstrued" the District Court's findings; 2) there is lack of uniformity among the Circuit Courts of Appeals concerning preliminary injunctions; 3) the chilling effect of fingerprinting is an important national issue; and 4) there is lack of uniformity among the Circuit Courts of Appeals on the fingerprinting issue.

The foregoing assertions have not been demonstrated by Petitioners. The Court should deny the Petition for Writ of Certiorari because the United States Court of Appeals for the Seventh Circuit did not "improvidently exercise" its discretion. Synanon foundation, Inc. v. Texas, 444 U.S. 1307, 64 L.Ed.2d 454 (1979) (Rhenquist, J. in chambers) and the cases cited therein.

I.

THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT NEITHER "IGNORED" ANY STANDARDS FOR ISSUANCE OF THE PRELIMINARY INJUNCTION NOR "MISCONSTRUED" THE DISTICT COURT'S FINDINGS.

Petitioners fail to demonstrate that the Court of Appeals for the Seventh Circuit in its review of the District Court's decision, ignored any of the standards for issuing a preliminary injunction. The Court of Appeals found that the District Court was not clearly erroneous and did not abuse its discretion, this being the standard of review for preliminary injunctions. See, Decision Below, Petition p. 4a-5a. The Circuit Court of Appeals addressed and weighed irreparable harm, inadequacy of remedies at law, probability of success on the merits, and relative harm to the parties and the public.

A. Irreparable Harm. The Court of Appeals directed sharp attention to this issue and reiterated the longstanding tenet that "... even a temporary deprivation of first amendment freedom of expression rights is generally sufficient to prove irreparable harm", citing a long line of precedent. The Court of Appeals flatly rejected Petitioners' argument that Respondent suffered no harm because it could solicit in other localities. See, Decision Below at Petition pp. 9a-10a. The Court of Appeals upheld the District's finding that the fingerprinting inhibited

speech by discouraging prospective solicitors. The opinion quoted the testimony of Police Chief Stoecker which established that prospective solicitors were scared away by the fingerprinting. Opinion Below, Petition p. 3a. In addition, the District Court found that Respondent's solicitors chose not to solicit rather than be fingerprinted.

B. Inadequate Remedy At Law. The Court of Appeals dealt squarely with this issue and concluded that "... injunctions are especially appropriate in the context of first amendment violations because of the inadequacy of money damages", citing its previous decision in Flower Cab v. Petitte, 685 F.2d 192 (7th Cir. 1982). See, Decision Below at Petition p. 10a.

C. Probability of Success On The Merits. As Petitioners correctly point out, the Court of Appeals found ample support in the record to support the District Court's finding that Respondent established a probability of success on the merits.

Petitioners go on, however, to chide the Court of Appeals for finding "ample support in the record" for the District Court's ruling as if the Court of Appeals rested its decision on the two, off-handed remarks made by the District Court and culled from the record by Petitioners. Petitioners completely ignore both the specific ruling of the District Court and the Court of Appeals' careful review and analysis of the facts developed at the preliminary injunction hearing. See,

Opinion Below at Petition pp. 2a-3a, 8a-9a. In summary, the Court of Appeals determined that the record amply supported the following District Court findings:

> i) Petitioner's solicitors chose not to solicit rather than submit to fingerprinting which they associated with having committed a crime;
>
> ii) the fingerprinting as conducted by Petitioners' procedures could not be used for conducting criminal background investigations and these investigations could be and were conducted by other means);
>
> iii) the only possible use of the fingerprints would be subsequent criminal investigations, but even this possible use would be fraught with problems because of the unprofessional manner in which the fingerprints are taken;
>
> iv) the fingerprinting of solicitors had never been used for subsequent criminal investigations and;
>
> v) that fingerprinting had a chilling effect on protected speech because not only had Respondent's solicitors refused to submit fingerprinting, but other prospective solicitors had forgone applying for

solicitation permits when they saw the fingerprinting process.

The Court of Appeals properly concluded that all of the foregoing demonstrated Respondent's probability of succeeding on the merits and Petitioners' failure to demonstrate any likelihood of success because fingerprinting solicitors does not promote "a substantial government interest that would be achieved less effectively absent the regulation", as required by Ward v. Rock Against Racism, 109 S.Ct. 2740 (1989).

The Court of Appeals spoke in terms of a "probability of success". Petitioners attempt to make distinctions between "reasonable likelihood", "some likelihood", and "probability" of success on the merits. These are semantic differences, and nothing more, because the "sliding scale" balanced harm against likelihood of success and the quantum of one is tied to the quantum of the other. This is discussed next.

D. "The Sliding Scale": Weighing Relative Harm Of The Parties And The Public Against Likelihood of success. The Court of Appeals concluded its opinion with its "sliding scale" analysis which balanced harm to the parties and the public against the likelihood of success on the merits. Opinion Below at Petition pp. 5a, 10a. Petitioners and the public would not suffer harm because the fingerprinting is worthless and Petitioners did not demonstrate any

likelihood of success on the merits because the fingerprinting inhibited protected speech. Thus, Petitioners' side of the scale was empty.

Having previously found that Respondent would suffer irreparable harm and had shown a probability of succeeding on the merits, the Respondent's side of the scale was heavy. The scale shifted decidedly toward Respondent.

The Court of Appeals left no stone unturned in examining the District Court's decision to grant preliminary injunctive relief. It "misconstrued" nothing.

II.

THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS CONCERNING STANDARDS FOR ISSUANCE OF PRELIMINARY INJUNCTIONS.

Petitioners nakedly assert that there is a lack of uniformity among the Circuit Courts of Appeals relative to the standards for issuance of preliminary injunctions. Yet, Petitioners fail to demonstrate it. They fail to cite <u>any cases at all</u>. Indeed, an examination of the decisions indicates uniformity among the Circuit Court of Appeals. Each and every Circuit Court of Appeals has utilized the traditional elements of

irreparable harm and inadequate remedies at law recognized by the this Court in Sampson v. Murray, 415 U.S. 61. 39 L. Ed 2nd 166 (1974), Thornburg v. American College, 476 U.S. 747, 90 L.Ed.2d 779 (1986), and University of Texas v. Camenisch, 451 U.S. 390, 68 L.Ed.2d 175 (1981).

Two additional elements, a measure of success on the merits and a balancing of the respective harm to the parties and the public, have also been utilized by all Circuit Courts of Appeals for issuing preliminary injunctions. Like the Court of Appeals for the Seventh Circuit, the other courts balance the various factors to determine an equitable result. While the formulations are not carbon copies of one another (although some are identical), the legal principles are uniform. The Court is referred to the following decisions:

Unisys Corp. v. Dathware Products, Inc., 848 F.2d 311 (1st Cir. 1988), certiorari denied, 110 S.Ct. 836, 107 L.Ed.2d 831;

Long Island R. Co. v. Internat'l Ass'n of Machinists, 874 F.2d 901 (2nd Cir. 1989), certiorari denied, 107 L.Ed.2d 831 (1990);

Interstate Air Freight Co. v. C.F. Air Freight, 882 F.2d 797 (3rd Cir. 1989);

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State of California v. American Stores Co., 872 F.2d 837 (9th Cir. 1989) and Airline Pilots Ass'n v. Alaska Airlines, Inc., 898 F.2d 1393 (9th Cir. 1990);

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Sea Containers Ltd. v. Stena, 890 F.2d 1205 (D.C. Cir. 1989).

Petitioners cite Roland Machinery Co., v. Dresser Industries, 749 F.2d 380 (7th Cir. 1984) for the proposition that there is a lack of uniformity among the Circuit Courts of Appeals and quote one sentence from the opinion. In the same opinion, however, the Court of Appeals for the stated:

> "....But the apparent discord is mostly verbal. Beneath the welter of apparently conflicting precedents we sense agreement on the following principles: ...[irreparable injury to plaintiff, inadequate remedy at law, relative harm to defendant, likelihood of success on the merits, and the public interest]...". 749 F.2d at 385.

Indeed, these agreed upon factors are the very factors which have traditionally been utilized by courts of equity in deciding preliminary injunctions.

The Court of Appeals for the Eighth Circuit, which had enumerated the "traditional test" in Minnesota Bearing Co. v. White Motor Corp., 470 F.2d 1323 (8th Cir. 1973), had been credited with formulating an "alternative test" in Fennel v. Butler, 570 F.2d 263 (8th Cir. 1977), certiorari denied, 437 U.S. 906, 98 S.Ct. 3093, 57 L.Ed.2d 1136 (1978). That court, however, has now made it clear that what has been called an "alternative test" by the Courts of Appeals for the Second and Ninth Circuits is really nothing different from the "traditional test" followed in all other Circuit Courts of Appeals:

> "Despite this label [i.e. 'alternative test'], we find no contradiction between Fennell and Minnesota Bearing. Whatever the verbal formulation, the

> relevant factors remain the same. Whether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest."

Dataphase Systems, Inc. v. C L Systems, Inc., 640 F.2d 109, 113 (8th Cir. 1981).

Therefore, while the various Circuit Courts of Appeals may have developed different formulations, there have adhered to consistent legal principles. There is no conflict. The realm of preliminary injunctive relief is not susceptible to "wooden" tests. "Our goal has been to achieve a clear verbal formulation yet maintaining a flexible rule". Dataphase Systems, Inc. v. C L Systems, Inc., 640 F.2d at 114.

III.

FINGERPRINTING OF SOLICITORS IS NOT AN IMPORTANT NATIONAL ISSUE

Only two Circuit Courts of Appeals have considered the chilling effect of fingerprinting ordinances as applied to

door-to-door solicitors: the Court of Appeals for the Seventh Circuit, in the instant case, and the Court of Appeals for the Third Circuit in New Jersey Citizen Action v. Edison Township 797 F.2d 1250 (3rd Circ. 1980), certiorari denied, 479 U.S. 1103 (1987). (In Holy Spirit Assn. v. Hodge, 582 F. Supp. 492 (N.D. Tex. 1984), cited at Petition, p.7, the fingerprinting issue was decided on the face of the ordinance, not on its application.) These cases arose from ordinances promulgated by two localities in two states, Illinois and New Jersey respectively. These two, isolated instances among the thousands of localities, the fifty States and the twelve Circuit Courts of Appeals hardly rise to the level of importance requiring review by this Court.

IV.

THERE IS NO CONFLICT AMONG THE TWO CIRCUIT COURTS OF APPEALS WHICH HAVE CONSIDERED THE CHILLING EFFECT OF FINGERPRINTING ON THE EXERCISE OF SPEECH BY SOLICITORS.

Petitioners assert that there is a lack of uniformity on the fingerprinting issue, but fail to demonstrate it. They are hard pressed to do so because both the Court of Appeals for the Seventh Circuit and the Court of Appeals for the Third Circuit have found that fingerprinting has

a chilling effect on the exercise of protected speech by solicitors. Furthermore, the Court of Appeals for the Seventh Circuit in its Decision Below found that fingerprinting did not promote a substantial government interest as required by Ward v. Rock Against Racism, supra. The Court of Appeals for the Third Circuit in New Jersey Citizen Action, supra, found that there was "no demonstrated relationship" between canvassers and criminal behavior. The latter was decided before Ward. There can be little doubt the Third Circuit would have arrived at the same result if it had been guided by Ward's "promote a substantial government interest" test. Again, the District Court decision in Holy Spirit Assn. v. Hodge, supra, is not relevant to the uniformity issue as it did not consider a fingerprinting ordinance as applied, only on its face.

Therefore, the chilling effect of fingerprinting, although only ruled upon by two Circuit Court of Appeals, has been uniformly held unconstitutional.

V.

CONCLUSION

For the foregoing reasons, Respondent requests that the Petition for Writ of Certiorari be denied.

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